

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|--|---|--------------------|
| TYRONE L. OLIVER |) | |
| Claimant |) | |
| VS. |) | |
| |) | |
| THE BOEING CO. - WICHITA |) | Docket No. 192,223 |
| Respondent |) | |
| AND |) | |
| |) | |
| AMERICAN MANUFACTURERS MUTUAL INSURANCE |) | |
| Insurance Carrier |) | |
| AND |) | |
| |) | |
| WORKERS COMPENSATION FUND |) | |

ORDER

Respondent and its insurance carrier requested review of the Award dated March 31, 1997, entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument on September 24, 1997.

APPEARANCES

Stephen J. Jones of Wichita, Kansas, appeared for the claimant. Eric K. Kuhn of Wichita, Kansas, appeared for the respondent and its insurance carrier. Kurt Ratzlaff of Wichita, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 31.5 percent disability for a work-related injury which claimant sustained during the period from March 15, 1994, through March 24, 1994. Respondent and its insurance carrier requested the Appeals Board to review the issue of nature and extent of claimant's disability. That is the only issue before the Appeals Board on this review.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons below, the Award should be modified.

(1) Claimant began working for respondent in March 1985 as a sheet metal assembler. Claimant ceased working for the respondent on March 24, 1994. For the final two years of claimant's employment with respondent, claimant experienced symptoms in his hands and shoulders when performing the inner door assembly on cargo doors for the 737 airplane. At one point respondent transferred claimant to other jobs and claimant's symptoms subsided. However, approximately 6 to 12 months before claimant stopped working for respondent, claimant returned to the inner door assembly job which had caused his earlier symptoms. After returning claimant to the inner door assembly job, respondent also requested him to work mandatory overtime in an attempt to increase production.

(2) After returning to the inner door assembly position, claimant's bilateral shoulder and arm symptoms increased to the point claimant sought medical treatment for his upper extremities from respondent's medical department on March 15, 1994. The medical department refused to place work restrictions on claimant and returned him to his regular duties. Unable to continue to work, claimant returned to the medical department on March 24, 1994, and again requested treatment and restrictions. Believing he could not continue to work and after being refused both medical restrictions and a job transfer claimant resigned his employment with the respondent on March 24, 1994.

(3) The parties stipulated claimant sustained personal injury by accident arising out of and in the course of his employment with respondent during the period from March 15, 1994, through March 24, 1994. The Appeals Board finds claimant sustained

permanent injury to both upper extremities as a result of the work he performed for the respondent during the period in question. For purposes of computation of the award, March 24, 1994, is selected as the accident date for the period of injury as that is the last day claimant sustained the repetitive trauma which was causing his injury.

(4) After his resignation, claimant immediately found employment with Dondlinger Construction Company and began working for the company on April 4, 1994. Claimant worked for Dondlinger performing equipment maintenance until July 6, 1994, when he was terminated due to his inability to climb on cranes to perform the necessary maintenance. Approximately one month after leaving Dondlinger, claimant found employment with Kansas Forklift as a field technician performing light equipment maintenance. At Kansas Forklift, claimant received \$10 per hour, or approximately \$400 per week, but no fringe benefits or additional compensation items as defined by K.S.A. 44-511. At the time of regular hearing, claimant remained in Kansas Forklift's employment.

(5) As a result of the work claimant performed for respondent, claimant developed shoulder impingement syndrome, bicipital tendonitis, and carpal tunnel syndrome as diagnosed by Philip R. Mills, M.D. Dr. Mills evaluated claimant in March 1996 at the Administrative Law Judge's request and is board certified in physical medicine and rehabilitation. As indicated by Dr. Mills, claimant should now avoid resisted gripping or crimping, repetitious or prolonged wrist flexion and extension, vibratory tools, direct wrist pressure, cool work environments, and more than episodic occasional overhead work. Because of his work-related accident, claimant now has, at a minimum, a 6 percent whole body functional impairment as rated by Dr. Mills using the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised).

(6) Claimant was not aware what permanent work restrictions and limitations he should observe due to his bilateral upper extremity injury until being evaluated by Dr. Mills in March 1996. Since learning of his permanent work restrictions, claimant has not returned to respondent to ask for accommodated employment. Since refusing claimant's request for accommodated work in March 1994, respondent has not offered claimant an accommodated position.

(7) During the 15-year period before the stipulated period of accident, claimant worked for the respondent, Cessna Aircraft, and Reed & Fugate Auto Electric. Through Dr. Mills' testimony, claimant has established he is now unable to perform 9 of the 10 job tasks he performed for respondent and at least 6 of the 8 tasks he performed while working for Cessna Aircraft. Dr. Mills indicated claimant could perform all 3 tasks he performed while working for Reed & Fugate Auto Electric. Based upon that testimony, the Appeals Board finds claimant is unable to perform 15 of 21, or 71 percent, of the tasks he performed in substantial, gainful employment during the 15-year period preceding the date of his work-related accident.

(8) The parties stipulated claimant's average weekly wage for the period of claimant's accident was \$1,007.60. Claimant's post-injury wage is \$400 per week. Comparing the pre- and post-injury wages yields a 60 percent difference.

CONCLUSIONS OF LAW

Because his is an "unscheduled" injury, claimant's permanent partial disability benefits are governed by K.S.A. 44-510e which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Citing Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), respondent and its insurance carrier argue claimant's permanent partial disability benefits should be limited to claimant's functional impairment rating. They argue the Foulk principles apply because claimant voluntarily resigned his employment in March 1994 and, also, never returned to respondent to request accommodated employment.

Under the factual situation presented, the Appeals Board finds that Foulk does not apply. The Appeals Board finds that claimant was justified in resigning his position after being refused both medical restrictions and a job transfer. Claimant had performed the cargo door job in the past and knew the physical problems it had caused before and was again causing. The Appeals Board finds claimant was unable to continue to perform the cargo door job in March 1994 when he resigned in his then-injured state. Also, the Appeals Board finds the requirements of that job are beyond what was later determined to be his permanent work restrictions and limitations.

The Appeals Board finds claimant exercised good faith in immediately finding other employment with Dondlinger Construction Company and Kansas Forklift. Therefore, claimant has satisfied the requirement of good faith as set forth by the Court of Appeals in Copeland v. Johnson Group, Inc., No. 76,829 (September 2, 1997).

As required by K.S.A. 44-510e, the Appeals Board averages the 71 percent task loss and the 60 percent wage difference and finds claimant has a 66 percent permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated March 31, 1997, entered by Administrative Law Judge Nelsonna Potts Barnes should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Tyrone L. Oliver, and against the respondent, The Boeing Co. - Wichita, and its insurance carrier, American Manufacturers Mutual Insurance, for an accidental injury which occurred March 24, 1994, at the rate of \$313 per week for 273.90 weeks or \$85,730.70, for a 66% permanent partial general disability, making a total award of \$85,730.70.

As of October 23, 1997, there is due and owing claimant 187 weeks of permanent partial disability compensation at the rate of \$313 per week in the sum of \$58,531.00 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$27,199.70 is to be paid for 86.90 weeks at the rate of \$313 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
Eric K. Kuhn, Wichita, KS
Kurt Ratzlaff, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director